UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

DONGDONG HUANG, Plaintiff, vs. CONTINENTAL TIRE THE AMERICAS, LLC, a foreign limited liability company, Defendant.	§ § § § § § § § § §	CASE NO. 2:10 CV 12598-RHC-PJK HON. ROBERT CLELAND MAGISTRATE PAUL J. KOMIVES

DEFENDANT CONTINENTAL TIRE THE AMERICAS, LLC'S MOTION TO EXCLUDE EVIDENCE OR, IN THE ALTERNATIVE, MOTION IN LIMINE REGARDING DISSIMILAR TIRES AND BRIEF IN SUPPORT

MOTION

Defendant Continental Tire the Americas, LLC (hereinafter referred to as "CTA") hereby respectfully moves the Court for an Order precluding Plaintiff from referring to or otherwise attempting to introduce any evidence, expert or otherwise, regarding or referring to tires of types, sizes and designs that are not substantially similar to the General Ameri*GS60 P215/70R15 radial passenger car tire (manufactured at CTA's Mt. Vernon, Illinois plant the 12th week of 1999), which is at issue in this case, including, but not limited to, the substantially dissimilar tires in the *Albee v. CTNA*, Case No. 2:09-cv-01145 (pending in the E.D. Cal.) and *Lampe v. Continental General Tire, Inc.* cases.

WHEREFORE, CTA respectfully requests that this Court grant CTA's Motion and before the voir dire examination of the jury panel has begun, before any opening statements are made to the jury, and before the introduction of any evidence, respectfully moves the Court to instruct Plaintiff, Plaintiff's counsel, and all of its witnesses (hereinafter collectively referred to as "Plaintiff") to refrain from making any mention through interrogation, voir dire examination, opening statement, arguments or otherwise, either directly or indirectly, concerning any of the matters hereinafter set forth, without first approaching the bench and obtaining a ruling from the Court, outside the presence and hearing of all prospective jurors and the jurors ultimately selected to try this case, with regard to, any evidence, expert or otherwise, regarding or referring to tires of types, sizes and designs that are not substantially similar to the General Ameri*GS60 P215/70R15 radial passenger car tire, manufactured at CTA's Mt. Vernon, Illinois plant during the 12th week of 1999, which is at issue in this case, including, but not limited to, the substantially dissimilar tires in the *Albee v. CTNA*, Case No. 2:09-cv-01145 (pending in the E.D. Cal.) and *Lampe v. Continental General Tire, Inc.* cases.

CERTIFICATE OF LOCAL RULE 7.1(a) CONFERENCE

This is to certify that on January 16 and 17, 2012, CTA's counsel conferred with Plaintiff's counsel regarding the nature and basis of this Motion. Concurrence in the relief sought was not obtained. Consequently, the merits of this Motion are presented to the Court for its determination.

BRIEF IN SUPPORT

ISSUES PRESENTED

Whether this Court should preclude Plaintiff and their experts from referring to or otherwise attempting to introduce any evidence referring or relating to tires of types, sizes and designs that are not substantially similar to the General Ameri*GS60 P215/70R15 bearing DOT serial number A3M3 44H 129 (manufactured the 12th week of 1999 in Mt. Vernon, IL) tire at issue here, including, but not limited to the substantially dissimilar tires in unrelated the *Lampe* and *Albee* cases because such evidence is (1) irrelevant and immaterial to the tire at issue, (2) is unfairly prejudicial to CTA, (3) Plaintiff's purported tire expert admitted at his deposition there were no substantially similar tires he intended to use to support his opinions, and (4) would result in undue confusion and delay caused by the mini-trial of each dissimilar tire?

Defendant Answers: Yes.

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I. INTRODUCTION

The subject matter of this suit is a General Ameri*GS60 P215/70R15 radial passenger car tire made at CTA's Mt. Vernon, Illinois plant ("Subject Tire"), bearing Department of Transportation (DOT) serial number A3M3 44H 129 ("Tire at Issue"). The DOT number indicates that the Tire at Issue was manufactured at CTA's manufacturing plant in Mount Vernon, Illinois, during the 12th week of 1999 (March 21 to March 27, 1999). In his Second Amended Complaint (Docket #19, at ¶¶ 20-25), Plaintiff alleges that, on or about August 18, 2007, he was a passenger in a 1999 Nissan Quest when the Tire at Issue, located at the left rear of the vehicle, "experienced a tread separation, causing a loss of control of the vehicle."

During the course of discovery, Plaintiff sought discovery regarding several other tire models, other tire sizes and tires involved in incidents not at issue in this case. In addition, Plaintiff sought discovery of documents from two unrelated cases (*Lampe* and *Albee*) involving tires that are substantially dissimilar to the Subject Tire. Discovery was permitted pursuant to this Court's July 5, 2011 Discovery Order, However, this Court noted in its July 5, 2011 Discovery Order that while some discovery on the issue would be allowed, the subject of substantially dissimilar tires was appropriate for a motion *in limine*: "That the tires are different or the time separation between the manufacture of the tires is too great is an argument for a motion in limine, or for the jury – not for the court in an effort to avoid discovery where the burden posed is de minimis." (Docket #44, at p. 13.) Various models, sizes and types of tires different from the Subject Tire and Tire at Issue have no relevance to the claims at issue here, even if CTA manufactured those other dissimilar tires.

Plaintiff's purported tire expert, Troy Cottles, testified at his deposition on December 9, 2011, he did not have any specific exemplar tires he intended to use to support his opinions. (Ex. A, Cottles Dep. at 21:15-23:3.) Mr. Cottles should not be allowed to opine regarding tires he considers exemplars or substantially similar to the Subject Tire or Tire at Issue because he stated at his deposition – the time to disclose such information -- that he did not intend to offer opinions regarding such. (*Id.*)

Nevertheless, based on his expansive discovery requests and discussions with counsel for Plaintiff, CTA anticipates Plaintiff will attempt to distract, confuse and inflame the jury at time of trial by seeking to introduce evidence or argument regarding other models of tires, tires manufactured to other design specifications, tires manufactured at other facilities, and/or tires manufactured in other time periods in an improper effort to show the existence of a defect or notice of such defect in the Tire at Issue. Because such evidence (1) is irrelevant and immaterial to the issues before the Court, (2) is unfairly prejudicial to CTA, and (3) would result in undue confusion and delay caused by the mini-trial of each dissimilar tire, evidence related to dissimilar tires must be excluded.

In the alternative, this Court should prohibit Plaintiff, including their counsel and all witnesses in this litigation, from referring to, commenting upon, or otherwise attempting to introduce any evidence regarding other models or types of tires, tires manufactured to other specifications, tires involved in other incidents, tires manufactured at other facilities, and/or tires manufactured in other time periods, including, but not limited to the *Lampe* and *Albee* tires until Plaintiff establishes the proper predicate for the admissibility of such evidence pursuant to Federal Rule of Evidence 104.

II. ARGUMENT[1]

The focus of this product liability case is the design and manufacture of the tire that allegedly failed – a particular General Ameri*GS60 P215/70R15 radial passenger car tire,

[1] Copies of cases cited herein will be submitted to the Court in a separate "Case Appendix" pursuant to the Court's March 17, 2011 Amended Scheduling Order at p. 6.

bearing Department of Transportation (DOT) serial number A3M3 44H 129 produced in the 12th week of 1999 at CTA's Mt. Vernon, Illinois plant. Other types of tires manufactured by CTA, and even other models and sizes of the General Ameri*GS60 brand name tires, have been made to different specifications and differ in design, manufacture, and performance. Evidence relating to tires other than the Tire at Issue involved in Plaintiff's accident should be excluded as it is irrelevant, unfairly prejudicial, and would result in undue confusion and delay caused by the mini-trial of each dissimilar tire.

A. Evidence Relating to Tires Other than the Tire at Issue is Irrelevant and Inadmissible

Product liability decisions in Federal and Michigan state courts have consistently required that evidence relate to the product at issue, and the manufacturer's handling of that product. *See, e.g., De Pue* v. *Sears, Roebuck, & Co.*, 812 F. Supp. 750, 752 (W.D. Mich. 1992) (granting motion in limine to exclude evidence of other accidents where the record was based on speculation as to causes of the other accidents); *Finchum v. Ford Motor Co.*, 57 F.3d 526, 533 (7th Cir. 1995) (evidence of defect in vehicles other than Ford Festiva properly excluded); *Johnson v. Ford Motor Co.*, 988 F.2d 573, 580 (5th Cir. 1993) (evidence relating to "different models of Ford vehicles or Escorts with model years different" properly excluded); *Murchie* v. *Standard Oil Co.*, 94 N.W.2d 799 (Mich. 1959); *Jones* v. *New York Central R. Co.*, 155 N.W.2d 216 (Mich. Ct. App. 1968) (Michigan law "require[s] not only that the prior [defects] be similar but that the conditions surrounding them be similar to those present at the time of the immediate injury"). The question of admissibility is considered on a case-by-case basis, with consideration to be given to a number of factors, including the degree of similarity of the products. *See Bright v. Firestone Tire & Rubber Co.*, 756 F.2d 19, 23 (6th Cir. 1984) and *Rye v. Black & Decker Mfg. Co.*, 889 F.2d 100, 102 (6th Cir. 1989) ("prior accidents must be 'substantially similar' to the one at issue before they will be admitted into evidence," which means that "the accidents must have occurred under similar circumstances or share the same cause."). In considering this proof, the court has the inherent power to exclude irrelevant material or marginally probative evidence which is outweighed by the dangers of confusion or unfair prejudice. *See* Fed. R. Evid. 403; *Rye*, 889 F.2d at 103 ("Even if there were such a showing of substantial similarity, however, the trial judge must 'weigh the dangers of unfairness, confusion, and undue expenditure of time in the trial of collateral issues against the factors favoring admissibility.'") (citations omitted); *see also Johnson*, 988 F.2d at 578 ("even when substantial similarity of circumstances is established, the district court has broad discretion to exclude such evidence under Rule 403"). Because evidence of dissimilar tires would be irrelevant and unfairly prejudicial to CTA in this case, any such evidence should be excluded.

Courts, including the Sixth Circuit, regularly exclude as irrelevant evidence of alleged defects in tires other than the tire specifically at issue. *See Bright*, 756 F.2d at 23; *see also Ryan v. General Tire*, 103 F.3d 145 (table), 1996 WL 699727, (10th Cir. 1996); *Staab v. Uniroyal Tire Co., Inc.*, Case No. 91-4096-CV-W-2, 1994 WL 230634 (W.D. Mo. May 3, 1994) ; *Fowler v. Firestone Tire & Rubber Co.*, 92 F.R.D. 1, 4 (N.D. Miss. 1980); *Cooper Tire & Rubber Co. v. Crosby*, 543 S.E.2d 21, 24-25 (Ga. 2001). For example, in *Fowler v. Firestone Tire & Rubber Co.*, the plaintiff alleged that a Firestone SBR 500 on his car had a tread separation resulting in an accident. Fowler sought to introduce evidence relating to SBR 500 tires in general. The court excluded this evidence, and limited the proof to the particular tire and specification involved in the accident. The court held:

> Consideration of evidence regarding tires produced under different specifications of a time remote from the production of the accident tire would unnecessarily confuse the issue before the court.

92 F.R.D. at 4.

In *Bright v. Firestone Tire & Rubber Co.*, the plaintiff had an accident resulting from a tread separation of a Firestone tire. The trial court excluded a government report that concluded that Firestone SBR 500 tires had a poor safety record. The report had examined accidents and complaints, and "relied heavily on data regarding the tire's adjustment ratio . . .." 756 F.2d at 22. The Sixth Circuit affirmed:

> Showing that the public generally had more problems with the Firestone 500 tire than with other tires does not prove that the particular tire involved in this case was defective, and has nothing to do with whether a tire defect caused this particular accident.

Id. at 23 (emphasis added).

In *Johnson v. Ford Motor Company* the Fifth Circuit upheld the trial court's ruling that evidence of other suits involving Ford vehicles was not probative and unfairly prejudicial to the defendant Ford.[2] *See Johnson*, 988 F.2d at 578-80. There, the plaintiff could not show that the other products or claims at issue in other suits were substantially similar to the specific product before the court. *Id.* Notably, the plaintiff in *Johnson* attempted to admit evidence of claims involving other Ford passenger vehicles. *See id.* Even though the proposed evidence concerned the same manufacturer, Ford, that similarity was not enough to support admissibility. Likewise, any evidence Plaintiff may seek to admit regarding other CTA tires that were not built to the same design specifications as the Tire at Issue would only serve to distract and mislead the jury. *See* Fed. R. Evid. 401, 402, and 403.

Plaintiff also should not be permitted to introduce information regarding adjustment data for other, unrelated tires manufactured by CTA. An adjustment, as the term is used in the tire industry, refers to a credit received when a tire is returned under warranty. (Ex. B, Dennis Bible Affidavit at ¶ 42 ("Bible Aff.").) An adjustment is a commercial concession usually made by the dealer or the sales representative to a customer. *Id.* In other words, adjustments are business transactions related to customer satisfaction. *Id.* An adjustment of a tire does not mean that a tire is defective. *Id.* Tires are adjusted for a variety of conditions in order to enhance consumer satisfaction. *Id.* The reasons for adjustments include sidewall flex breaks, impact breaks, tread tears, surface tears, belt conditions, bead conditions, ride and vibrations, and cosmetic reasons. *Id.*

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[2] *See also, Vockie v. General Motors Corp.*, 66 F.R.D. 57 (E.D. Pa. 1975), *aff'd*, 523 F.2d 1052 (3rd Cir. 1975)(excluding accident reports involving vehicles other than the type involved in plaintiff's accident); *Uitts v. General Motors Corp.*, 411 F. Supp. 1380, 1383 (E.D. Pa. 1974), *aff'd*, 513 F.2d 262 (3rd Cir. 1975) (evidence dealing with similar, rather than identical, vehicles inadmissible).

The admissibility of tire adjustment data was considered in a tire case by the Georgia Supreme Court in *Cooper Tire & Rubber Co. v. Crosby*, 543 S.E.2d 21 (Ga. 2001). In *Crosby*, the Plaintiff sought to introduce adjustment data for all tires manufactured in Cooper Tire's Texarkana plant for a nine year period. The trial court excluded the evidence on the grounds that plaintiff had not demonstrated the required "substantial similarity." The Georgia Supreme Court upheld the trial court's exclusion of this evidence, noting that plaintiff had not made any showing that:

> (1) Crosby's tire and the adjusted tires shared a common design and manufacturing process; (2) suffered from a common defect; and (3) that any common defects shared the same causation. Without these showings, it was impossible for the rule of substantial similarity to be satisfied.

Id. at 23; *see also, Uniroyal Goodrich Tire Co. v. Ford*, 218 Ga. App. 248, 260, 461 S.E.2d 877, 888 (1995), *aff'd in part and rev'd in part on other grounds*, 267 Ga. 226, 476 S.E.2d 565 (1996) (holding it was reversible error to admit adjustment data in a tire case without a "showing of similarity of the tire defects or the causes thereof. . .").

Not all tires designed and manufactured by CTA are substantially similar. (Exhibit B, Bible Aff. at ¶¶ 7-20.) A tire is a highly engineered, complex composite product that is the result of a specialized process involving a blend of polymer chemistry and mechanical engineering. Two tires are not substantially similar, unless the variables related to the design and manufacture of the tires, including the size, shape, placement, materials, and construction of components used to build those tires, are the same. (*Id.* at ¶ 7-20.)

A steel-belted radial tire typically contains many different components and several different rubber compounds. (*Id.* at ¶ 9.) These components must work together to ensure that the tire performs satisfactorily in its particular application or intended use. *Id.* As a result, components, materials, and construction features will vary among different types of steel-belted radial tires. (*Id.*) Although certain tires may share one or more common materials, the performance requirements of each tire will result in significant differences. *Id.* Numerous differences in design, construction, materials, functional characteristics, and conditions of use serve to distinguish one tire product from another. (*Id.* at ¶¶ 7-20.)

Tires are built to proprietary specifications that prescribe the tire size and overall type of construction; the number and type of components; the dimensions, gauges, and placement of each component; the manner and sequence of component assembly; and the equipment used in assembling and curing the tire. (*Id.* at ¶ 11.) In other words, the tire build specification establishes the manner in which the numerous design and construction variables are combined to produce a particular finished tire. (*Id.)* In short, the specification defines a tire product with respect to each aspect of its design, construction, and method of manufacture. (*Id.*)

The differences in tire designs and applications were discussed by the NHTSA in its report denying a petition to open an investigation of certain Firestone light truck tires.[3] (Ex. B, Bible Aff. at ¶ 10.) According to NHTSA:

> [B]ecause not all tires with the same broad label (*e.g.*, "Steeltex") are constructed in exactly the same way or designed for the same function, NHTSA often focuses on whether any specific grouping of similarly constructed tires (*e.g.*, distinguished by tire line, tire size, and/or date and location of manufacture) is defective.

See id.; Ex. C. Denial of Motor Vehicle Recall Petition, 72 Fed. Reg. 6,038-39 (Feb. 8, 2007).

The obvious differences between tires have been long recognized by the tire industry, vehicle manufacturers and the federal government. The Tire & Rim Association ("TRA"), for instance, provides guidelines for tire design so that tires and wheels produced by different manufacturers are interchangeable (which in no way suggests that mounting different brands of tires with different load capacities, sizes, and/or tread designs on the same automobile at the same time is advisable). (Ex. B, Bible Aff. at ¶ 12.) The TRA categorizes tires in terms of design and use: passenger tires, highway light truck, flotation light truck, medium and heavy truck, and so forth. (*Id.*) For each tire within each category, the TRA specifies maximum load carrying capacity at specified inflation pressures. (*Id.*) Similarly, the Federal government has promulgated different safety standards and testing requirements for passenger and light truck tires. (*Id.* at ¶¶ 17-18.) Vehicle manufacturers, using the TRA guidelines, specify the particular tire "fitment" (size and type), speed rating and other tire requirements for each vehicle they sell.

The Tire at Issue sustained a partial tread/belt separation and detachment. However, as even Plaintiff' designated tire expert concedes, the fact that a tire sustains a tread/belt separation and detachment does not mean a tire is defective. (Ex. A, Cottles Dep. at 42:3-15.) Tread/belt separations can result from a variety of different service conditions, including overdeflection (overloading and/or underinflation), mounting damage, unrepaired or improperly repaired punctures, impact damage, cuts, road hazards, and other types of service damage or abuse. (Ex. D, Grant Report at p. 3); *see also Shramek v. General Motors Corp.*, 216 N.E.2d 244, 247 (Ill. App. Ct. 1966) (the mere occurrence of a tire tread separation "does not demonstrate the manufacturer's negligence, nor tend to establish that the tire was defective" because it can result from numerous causes related to the use or abuse of the tire over time, among a myriad of other things). A tread/belt separation is not a defect, but refers to the result of some factor causing the steel belts to separate from one another and/or the surrounding components, and even detach from the carcass of the tire. (*Id.*) Therefore, the fact that tires may have tread/belt separations does not indicate a common defect or even a common class of tires. *See, e.g., Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 807 (Tex. 2006).

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[3] NHTSA is the regulatory and administrative agency created by Congress to enforce a uniform system of motor vehicle safety throughout the United States.

Accordingly, evidence relating to alleged problems, defects or malfunctions in tires dissimilar to the subject General Ameri*GS60 P215/70R15 passenger car tire does not tend to prove or disprove any material fact at issue, making such evidence irrelevant and inadmissible.

B. The Tires in *Lampe* and *Albee* cases Are Substantially Dissimilar Tires

As noted above, during the discovery phase of this case, Plaintiff sought a broad range of information regarding substantially dissimilar tires, including, specific requests for documents and testimony from two unrelated cases (*Lampe v. Continental General Tire, Inc.* and *Albee v. Continental Tire North America, Inc.*, No. S-09-1145 (E.D. Cal.)), which both involved tires that are substantially dissimilar to the Tire at Issue.

The tire at issue in *Lampe* was an Ameri*Tech ST P205/65R15 tire that CTA manufactured in October, 1992. Not only was this tire not manufactured from the same specification as the Tire at Issue, but it was not even the same size as the Tire at Issue and was manufactured 7 years before the Tire at Issue. (Ex. B, Bible Aff. at ¶ 26.) Furthermore, whereas the Tire at Issue was manufactured to be used as original equipment for Ford Villager and Nissan Quest minivans manufactured from August, 1998, through June, 2002, the *Lampe* tire, manufactured in 1992, was not. (*Id.*)

Likewise, the tire at issue in *Albee* was a General Ameritrac SUV P235/70R16 tire that CTA manufactured in July, 2003. It, too, was not only manufactured from a different specification as the Tire at Issue, but was also a different size from the Tire at Issue and was manufactured 4 years after the Tire at Issue. (*Id.* at ¶¶ 23-24.) Additionally, there are many differences as to the components within the Tire at Issue and the *Albee* tire, including different belt and ply widths and lengths; belt angles; tread width, length, and weight; and different style polyster ply cords. (*Id.* at ¶ 24.) Moreover, the Tire at Issue had only one ply, whereas the *Albee* tire had two, and the *Albee* tire had a greater maximum load carrying capacity than the Tire at Issue. (*Id.*) And the *Albee* tire was a replacement tire, not original equipment. (*Id.*)

Accordingly, Plaintiff should not be allowed to present evidence, testimony or documents from the *Lampe* or *Albee* cases in the case at bar because both involved substantially dissimilar tires, and as demonstrated herein, courts consistently refuse to admit evidence of substantially dissimilar products at trial as irrelevant, inadmissible, unduly prejudicial and likely to mislead and confuse a jury.

C. Evidence Relating to Dissimilar Tires Is Unfairly Prejudicial and Misleading

This Court should also exclude any evidence concerning or referencing alleged defects, problems or malfunctions in dissimilar tires because admitting such evidence would result in unfair prejudice to CTA and would mislead and confuse the jury. *See* Fed. R. Evid. 403 ("evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."). Admitting this type of improper evidence would allow the jury to impermissibly speculate as to the cause of the Tire at Issue's failure, and to improperly infer that a defect, problem or malfunction existed in the Tire at Issue. *See, e.g., Ryan*, 103 F.3d at 145 (evidence of tires made to different specifications than the Tire at Issue inadmissible due to unfair prejudice, confusion of the issues, and the potential for misleading the jury); *Staab,* 1994 WL 230634 at *1. In *Staab v. Uniroyal Tire Co.,* Uniroyal filed a motion in limine to exclude evidence relating to light truck tires other than those with the same load range and specifications as the tire at issue before the court. The court found that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Therefore, the court excluded evidence of tires made to different specifications from the Tire at Issue. *Id.*

Likewise, admission of evidence related to tires not substantially similar to the General Ameri*GS60 P215/70R15 radial passenger car tire would confuse the issues and potentially mislead the jury. These risks substantially outweigh any purported probative value of this evidence. Fed. R. Evid. 403; *Ryan*, 103 F.3d at 145; *Daskarolis v. Firestone Tire & Rubber Co.*, 651 F.2d 937, 940 (4th Cir. 1981) (considerations of potential confusion of the jury through introduction of another tire not related to the controversy is sufficient basis for exclusion under Fed. R. Evid. 403). There is a strong likelihood that a jury presented with evidence of other tires would confuse the failure of one or more of those tires with the subject General Ameri*GS60 P215/70R15 radial passenger car tire.

Additionally, admission of evidence related to other tires would result in undue delay by forcing CTA to conduct mini-trials related to the circumstances of each individual, dissimilar tire. *See* Fed. R. Evid. 403 ("[E]vidence may be excluded . . . by considerations of undue delay . . . ."). *See, e.g., DePue*, 872 F. Supp. at 752; *Brake v. Beech Aircraft Corp.*, 184 Cal. App. 3d 930, 938 (Cal. Ct. App. 1986); *Ahlschlager v. Remington Arms Co.*, 750 S.W.2d 832, 836 (Tex. Ct. App. 1988). In *Ahlschlager,* a consumer attempted to prove a design defect claim against a rifle manufacturer by introducing evidence of an allegedly similar defect in a different model of rifle. *Id.* The Texas Court of Appeals affirmed the trial court's exclusion of this evidence, stating that if the plaintiff had been allowed to "inflate the trial" with evidence of a different model, the defendant manufacturer "would necessarily have had to respond with cross-examination and additional rebuttal proof." *Id.* Here, too, admission of evidence related to other tires would lead to undue delay in the trial of this controversy. As in *Ahlschlager*, CTA would be forced to respond to accusations regarding other products with additional proof and examination, resulting in mini-trials over types of tires not involved in the litigation at hand.

III. EVIDENCE OF OTHER PRODUCTS SHOULD NOT BE ALLOWED THROUGH EXPERT TESTIMONY OR ON CROSS-EXAMINATION

Finally, Plaintiff should not be permitted to introduce evidence of dissimilar products through the "back door" of expert testimony. As stated above, Plaintiff's designated tire expert, Mr. Cottles testified at his December 9, 2011 deposition that he is not going to offer testimony regarding exemplar tires he contends are similar. (Ex. A, Cottles Dep. at 15:13-16:10.) In addition, when asked whether he had any documents provided by counsel with respect to tires he considered to be substantially similar to the Tire at Issue, Mr. Cottles stated "it's possible" but added that he had not "reviewed the files to see what tires I would break out into that category, as I sit here as I mentioned earlier." (*Id.* at 21:1-14.) Moreover, after CTA produced numerous documents in response to the July 5 Motion to Compel Order based on Plaintiff's motion seeking documents in other cases (*Lampe* and *Albee*), Mr. Cottles testified that he is not relying on that information for his opinions:

Q. So you are not going to rely on any of those documents in your opinions in this case, correct?

A. Not unless I have special permission to do that from you according to what you ask and what opinions I am offering.

Q. As you sit here now, though, you don't intend to rely on those documents in this case; correct?

A. As far as other similar, that's correct, I am not intending to rely upon documents in other cases as I sit here. Yes, I think that's my answer.

Q. I think you told me earlier you don't intend as you sit here now, you don't have in mind any particular, what you would call, other similar tires about which you're – or on which you are going to rely in this case, correct?

A. Yeah. As I'm saying, sitting here I haven't had discussion with counsel about other similar instances and I haven't reviewed my files to see what I might consider that to be.

Q. So there is nothing you and I can talk about that today?

A. At least not today, correct.

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Q. Exemplar – 23 is exemplar tires you contend are substantially similar. I think you have already told me you don't have any of those.

A. Correct.

Q. And since you don't have any exemplar tires and you haven't identified any tires that you regard as substantially similar in response to paragraph 24, there is nothing, right?

A. I said as we sit here today, that's correct.

(Ex. A, Cottles Dep. at 21:15-23:3.) December 9th was the date noticed and agreed upon for Mr. Cottles' deposition. It was the time for him to provide all bases for the opinions contained in his expert report. No specific tires were identified in his report as "substantially similar" to the Tire at Issue. (*Id.*) At his deposition, he stated he had no documents from other cases and no specific tires he intended to discuss to support his opinions in this case. (*Id.*) Having confirmed those facts, he should be precluded from testifying inconsistent with them at trial. The time to disclose such information has passed and that door is now closed.

In addition, while Federal Rule of Civil Evidence 703 states that otherwise inadmissible evidence may be admitted through an expert, the "facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." Fed. R. Evid. 703. If the Court allows such evidence, Rules 401, 402, and 403 would be rendered totally ineffective and it would encourage the abuses against which these rules were tailored to safeguard. Simply put, expert testimony cannot provide an avenue for the admission of otherwise improper evidence. *Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 409 (6th Cir. 2006) ("'We are persuaded that Fed. R. Evid. 703 does not permit an expert witness to circumvent the rules of hearsay by testifying that other experts, not present in the courtroom, corroborate his views.'") (quoting *United States v. Grey Bear,* 883 F.2d 1382, 1392-93 (8th Cir.1989)); *Smith v. Highland Park Ruritan Club,* No. 3:06-CV-351, 2008 WL 2669107, *4 (E.D. Tenn. June 27, 2008) (holding that an expert "cannot use his status as a medical expert to introduce otherwise objectionable evidence, such as the apparently speculative or hearsay evidence at issue."); *see also Greenwood Utilities v. Mississippi Power Co.*, 751 F.2d 1484 (5th Cir. 1985).

Further, Plaintiff should not be permitted to cross-examine CTA's expert witnesses regarding other, dissimilar products, for impeachment purposes or otherwise. Cross-examination on irrelevant hearsay is improper. *See In re Air Crash Disaster*, 86 F. 3d 498, (6th Cir. 1996) (holding that district court did not abuse its discretion in precluding airline from impeaching manufacturer's expert with evidence of a past plane crash, where "the time lapse, the different type of plane, the different type of airport, the different technology, the dubious relevance to the witness's currently-claimed expertise, and the need to avoid detailed inquiry into a separate plane crash" all supported exclusion.)

IV. CONCLUSION

Based on the foregoing, CTA respectfully requests that any evidence or argument regarding other dissimilar models and types of tires, including but not limited to the substantially dissimilar tires in the *Lampe* and *Albee* cases, be excluded. Such evidence is irrelevant, inadmissible, misleading, unfairly prejudicial, and will only confuse the issues before the jury.

Respectfully submitted,

By: s/Edward M. Kronk
Edward M. Kronk (P16258)
Herbert C. Donovan (P51939)
Maureen T. Taylor (P63547)
401 S. Old Woodward, Suite 400
Birmingham, MI 48009
Phone: (248) 971-1800
Fax: (248) 971-1801
kronk@bwst-law.com
donovan@bwst-law.com
taylor@bwst-law.com
Attorneys for Defendant Continental Tire the Americas, LLC

Dated: January 17, 2012

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2012, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

By: /s/Edward M. Kronk

Brooks Wilkins Sharkey & Turco PLLC
401 S. Old Woodward, Suite 400
Birmingham, MI 48009
Phone: (248) 971-1800
Fax: (248) 971-1801
taylor@bwst-law.com
Attorneys for Defendant Continental Tire the Americas, LLC